



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. 1 OF 2007

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF TRADE UNIONS ACT

AND

IN THE MATTER OF REGISTRATION OF THE KENYA POLICE UNION

NICKY NJUGUNA.....1ST APPELLANT

STEPHEN M. KYALO.....2ND APPELLANT

STEPHEN M. KARANI.....3RD APPELLANT

PAUL GICHURU MARUA.....4TH APPELLANT

VERSUS

REGISTRAR OF TRADE UNIONS.....RESPONDENT

AND

CENTRAL ORGANIZATION OF TRADE UNIONS (KENYA).....INTERESTED PARTY

JUDGMENT

This is an appeal against the decision of the Registrar of Trade Unions refusing to register the Kenya Police Union.

In the letter dated 9th January 2007, the Registrar of Trade Unions rejected the Appellants application dated 28th November 2002 pursuant to section 16(1) (d)(i) of the Trade Unions Act Cap 233 Laws of Kenya (Repealed). The Appellants were aggrieved by this decision and on 5th March 2007, filed their Memorandum of Appeal of the same date.

The grounds of appeal as set out in the memorandum of appeal are as follows

1. That the Registrar erred in law and in fact in rejecting the appellants application to be registered as a Trade Union by invoking Section 16 (1) (d) (i) of the Trade Unions Act yet there is no other union catering to the needs of the Police Force.
2. That the Registrar erred in fact by failing to state to the Appellant the alleged Trade Union which exists and is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration and therefore precluded the appellants from having another Trade Union registered.
3. That the Registrar erred in law and in fact in deciding that Section 3 of the Trade Disputes Act Cap 234 in its literal and ordinary meaning is understood to mean that Police officers have no capacity and/or are not qualified to register a Trade Union to cater for their interests like any other citizen subject only to section 80 of the constitution.
4. That the Registrar erred in law and in fact in refusing to register the Trade Union or defer its registration on the grounds that the

applicants cannot be officials of the Trade Union under Section 29 of the Trade Unions Act, yet the Kenya Police Union was meant to cater for the rights of all the members of the Police Force and not only the persons who applied to the Registrar for its registration.

5. That Registrar erred in law and in fact in failing to take into cognizance that the only grounds given under the law for refusing to register a Trade Union fall under Section 16 of the Trade Unions Act, Cap 233 of the Laws of Kenya.

6. That the Registrar erred in law and in fact in failing to accord the appellants their basic constitutional rights as guaranteed by the Constitution of Kenya under Sections 79 and 80 which guarantee the Freedom of Expression, Freedom of Assembly and Association to all citizens.

7. That the Registrar's decision was inconsistent with the above stated provisions of the Constitution of Kenya, a violation, hence the same is null and void.

8. That the Registrar erred in fact by failing to give specific and adequate reasons for the refusal to register, the Kenya Police Union;

9. That the Registrar erred in failing to consider that the interests in respect of which the Kenya Police Union seeks registration are not represented substantially or at all by any other union.

10. That the Registrar failed to consider that as members of the Police force the officers are employees of the Government with special and distinct needs and circumstances which are not adequately represented by any trade union and hence their grievances cannot be satisfactorily presented/communicated and/or settled.

It is the Appellants' position that the Respondent ought to have accorded them their freedom of expression, assembly and association as provided under sections 79 and 80 of the repealed Constitution.

On 26th February 2018 the Respondent filed Memorandum of Reply to the appeal. The Respondent avers that the appeal does not stand since the Respondent declined to register the police union pursuant to section 16(1) of the Trade Unions Act (Repealed) and issued the appellants with a notification regarding the same stating the grounds for refusal as follows:

The Kenyan Police and members of the armed forces were not allowed to form a union by virtue of section 3 of the Trade Disputes Act (Repealed).

a. The Appellants were not members of the Kenya Police Service hence did not have the locus standi by virtue of section 29 of the Trade Unions Act (Repealed).

b. Section 40 of the Police Act (Repealed) prohibited police officers from being members of trade unions.

It is the Respondent's case that the applicable law has since been repealed and that sections 3 of the Labour Relations Act and section 47(3) (g) of the National Police Service Act prohibit police officers from forming trade unions or participating in its activities.

The Respondent avers that articles 36 and 41 guarantee the right to freedom of association which is enforced through statutory provisions so long as they are not inconsistent with the Constitution. Further, Article 24(5) of the Constitution provides that legislation may limit application of rights under Articles 31, 36, 37 and 41.

Submissions by the Parties

Parties filed their written submissions which they highlighted in court on 5th December 2018.

The Appellants filed detailed written submissions dated 27th September 2018. In the submissions the appellants rely on the provisions of the Constitution 2010 and the Labour Relations Act, 2007 which they submit do not bar the police from becoming members of a trade union.

The appellants further submit that Section 16(1)(d)(i) of the Trade Unions Act only permits the Registrar of Trade Unions to refuse the registration of a union if another union exists that caters for the same interests. Further that the Trade Disputes Act does not bar the police from forming a union. The appellants further submit that the Registrar must have misinterpreted the provisions of Rules 44 – 48 of part IV of the Police Regulations which create the Kenya Police Representative Association objects whose are set out at Rule 46 as: -

(1) To bring to the notice of the Commissioner and the Government matter affecting their welfare and efficiently including pay, pensions, conditions of service other than discipline and promotion affecting individual plie officers.

It therefore emerges that there is no body in existence that addresses the concerns of police officers to the extend provided above and as such, the appellant's applications was warranted and justifiably cogent under our existing laws.

In their oral highlights and the written submissions, the Appellants contend that the rights under section 80 of the Constitution applied to all persons because there was no provision in the Trade Unions Act denying the police such rights. It was their submission that it was not the intention of the legislature to lock out the police from forming a trade union.

The Appellants submitted that sections 79 and 80 of the Repealed Constitution guaranteed the freedom of association and the freedom of

expression thus could only be limited but not denied. However, the Appellants note that since the appeal was lodged, new laws were promulgated under which every person is entitled to unionize under Article 41 of the Constitution. The Appellants further submit that the rights can only be limited subject to the provisions of Article 24 of the Constitution.

It is the Appellants' submissions that section 47 of the National Police Service Act denied the police the right to unionize, rather than limit it.

During the highlighting of the submissions for the Interested Party, counsel stated that he wished to rely on its comprehensive memorandum filed on 24th July 2007 and comprehensive written submissions filed on 25th June 2012. I have checked the record and there are no submissions filed by the Interested Party on 24th July 2012. What was filed on that date is the memorandum of the Interested Party and the affidavit in support of the memorandum of the Interested Party.

In both the memorandum and the supporting affidavit of Rajab W. Mwondi sworn on 24th July 2007, he deposes that the appellants complied with all requirements for registration as provided in the Trade Unions Act, that the Registrar adopted grounds outside the Trade Unions Act in refusing the application for registration by the appellants and that Section 16(1)(d)(i) of the Act only bars registration of a trade union if there exists another union that caters for similar interests. Mr. Rajab Mwonde deposes that he knows of no such union and that the Act does not exclude police officers from forming or becoming members and participating in trade union activities.

It is deposed that reliance by the Registrar of Trade Unions on the provisions of sections of the Trade Disputes Act to deny appellants' registration contradict the grounds used to deny the appellants' registration under the Trade Unions Act.

It is further the deposition of Rajab Mwondi that the Police Act, came into force on 1st February 1961, eleven (11) years after the Trade Unions Act came into force on 1st August 1952 and that the Police Act does not provide for issues of collective bargaining as envisaged under the Constitution and the Trade Unions Act.

That there is a disconnect and lacuna of a channel to vent structurally all issues that form elements of an ordinary Collective Agreement, regarding members of the Police Force, the Constitution of Kenya and the Trade Unions Act.

That it is emerging from Jurisdictions close and far from Kenya that they have allowed under the ILO Conventions for the formation and registration of Police Unions. That the constitutions, rules and regulations of such police unions do not permit their membership to engage in industrial action in terms of strikes.

That the Appellants efforts to have The Police Union registered is not unique or strange in the world as Police Unions have been registered in South Africa, Scandinavian Countries and Europe at large to cite but a few examples. That countries which have registered Police Unions do allow them to be affiliated to their National Trade Centres. That the European Union has what is referred to as the European Confederation of Police Unions which is the European umbrella organization of 30 police unions and staff organization.

It is submitted that, the police unions have been in existence for over one hundred (100) years in other jurisdictions without any disharmony or civil unrest giving examples of Swedish Police Union which was founded in 1903 and is a politically independent union.

The Interested Party thus prays that the appeal be allowed and the decision of the Registrar of Trade Unions refusing to register the Police Union be quashed or set aside.

The submission filed on 5th May 2013 on behalf of the Interested Party are not relevant as they relate to Articles 2(4), 10(1), 24, 25, 36 and 41 of the Constitution 2010 which as I have pointed out elsewhere in his judgment, are not applicable to this appeal as the Constitution was not in force at the time relevant to this suit.

The Interested Party submitted that section 16(1)(b) of the Trade Unions Act which the Registrar relied on to reject the registration of the Police Union, related to trade unions already in existence. It further submitted that the trade union in question was not in existence then, nor is it in existence now. Further that the Registrar was wrong in relying on section 3 of the Trade Disputes Act.

It is the Interested Party's submissions that Article 2 of the International Labour Convention of 1948 that accords all employees the right to trade unionism is applicable in Kenya by virtue of Article 2 of the Constitution.

The Interested Party submitted that the Kenya Police Union can be formed as one of those cadre of employees allowed to unionize but prohibited from striking. The Interested Party drew the attention of the Court to the transitional provisions which require all laws to be construed in conformity with the Constitution.

The Respondent filed detailed written submissions dated 31st July 2018. In the oral highlights of the written submissions, the Respondent submitted that the Orders sought by the Appellants pursuant to section 11 of the Trade Unions Act cannot be issued because the Act was repealed. The Respondent further submitted that the prayer to declare section 47 (3) (g) of the National Police Service Act unconstitutional cannot issue because there are no constitutional issues before this court.

It is the Respondent's submissions that Section 47 of the National Police Service Act and section 3 of the Labour Relations Act are in line with Article 24 of the Constitution. The Respondent further submitted that it is not possible to register a trade union because it was prohibited by section 40 of the Police Act.

The Respondent also submitted that there was no issue before this court because, the Court of Appeal in rendering its judgment did not refer any issues for determination. The Respondent contended that the Constitution is superior to the ILO Conventions ILO Conventions have to

be domesticated before they can be applied..

In response to the oral submissions by counsel for Respondent, the Appellant contended that the Court of Appeal dealt with the issues raised in the Application dated 3rd December 2012 and not those raised in this appeal.

Determination

After considering the evidence adduced by the parties, the following are the issues for determination:

1. Whether the refusal by the Registrar to register the Kenya Police Union contravened the provisions of the repealed Constitution and the Law
2. Whether the Appeal should be allowed

Whether the refusal by the Registrar to register the Kenya Police Union contravened the provisions of the Repealed Constitution

The Appellants submitted that Sections 79 and 80 of the Repealed Constitution guaranteed the freedom of association and the freedom of expression thus could only be limited but not denied. The Interested Party submitted that section 16(1)(b) of the Trade Unions Act which the Registrar relied on to reject the Appellant's trade union, related to trade unions already in existence. On the other hand, the Respondent submitted that Section 80 of the Constitution limited the freedom of assembly and association in respect to the people belonging to the disciplined forces.

In the letter dated 9th January 2007, the Registrar of Trade Unions rejected the Appellants application dated 28th November 2002 pursuant to Section 16(1)(d)(i) of the Trade Unions Act Cap 233 Laws of Kenya (Repealed). The Notification of Refusal of Registrations states –

It is hereby notified that the registration of THE KENYA POLICE UNION as a Trade Union under the Trade Unions Act is hereby refused. The grounds for such refusal are as follows:

Police Officers are not qualified to belong to a trade union under Cap 234 Section 3.

Under Section 29 of Cap 233, you do not qualify to be officials of the union as none of you are members of the police force"

Section 3(b) of the Trade Disputes Act (repealed) stipulates that it does not apply to persons in the police force.

Section 80 of the Repealed Constitution of Kenya Provided as follows:

(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(a) that is reasonably required in the interests of defence, public Protection of freedom of expression. Protection of freedom of assembly and association. Constitution of Kenya Protection of freedom of movement. safety, public order, public morality or public health;

(b) ...

(c) that imposes restrictions upon public officers, members of a disciplined force, or persons in the service of a local government authority; or

(d) ..."

Section 40 Police Act (repealed) provides as follows

40. Prohibition against police officer being member of trade union.

(1) It shall not be lawful for any police officer to be or to become a member of—

(a) any trade union, or any body or association affiliated to a trade union; or

(b) any body or association the objects or one of the objects of which is to control or influence conditions of employment in any trade or profession; or

(c) any body or association the object or one of the objects of which is to control or influence the pay,

pensions or conditions of service of the Force, other than a staff association established and regulated pursuant to regulations made under this Act.

(2) Any police officer who contravenes this section shall be liable to be dismissed from the Force and to forfeit all rights to any pension or gratuity.

(3) If any question arises as to whether any body is a trade union, or body or association to which this section applies, the question shall be referred to the Minister, whose decision thereon shall be final and conclusive.

Article 5 of ILO Convention C098 – Right to organise and Collective Bargaining Convention, 1949 (No. 98) states as follows

Article 5

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

It is important from the outset to understand that the appeal before this court is dated and filed on 5th March 2007 and is made pursuant to provisions of the Trade Unions Act, the Trade Disputes Act, the Police Act and the Constitution of Kenya, all of which have been repealed and replaced by the Labour Relations Act, the National Police Service Act and the Constitution of Kenya, 2010. No amendments were made to the petition and no new application was made for the registration of the Kenya Police Union by the appellants under the new legislation. The relevant provisions for purposes of determination of this appeal are therefore the repealed legislation. For this reason any reference to the provisions of the new legislation is not relevant and will not be applied to this judgment for reason that the said new legislation do not provide for then retrospective application.

The court further notes that The Fifth Schedule to the Labour Relations Act provides for transition of trade unions, pending applications for registration and pending disputes as follows –

FIFTH SCHEDULE (S 84)

TRANSITIONAL PROVISIONS

1. Existing trade unions, employers organisation and federations

(1) A trade union, employers organisation or federations registered under the Trade Unions Act before the commencement of this Act, shall be deemed to be registered under this Act.

(2) As soon as practical after the commencement of this Act, the Registrar shall –

(a) enter the names of existing trade unions, employers organisations and federations into the registers as specified in section 19 of this Act;

(b) issue a certificate of registration in accordance with section 19 of this Act.

(3) If any provision of a constitution of a trade union, employers' organisations or federation does not comply with the requirements of this Act, the trade union, employers organisation or federation shall amend its constitution and submit the amendments to the Registrar within six months of the commencement of this Act.

(4) The provisions of section 19 of this Act apply to an amendment made under subparagraph (3). **2. Pending application for registration.**

(1) Any pending application for registration, alteration of the name of a constitution, or amalgamation shall be deemed to have been made under this Act.

(2) When dealing with an application referred to in paragraph (1), the Registrar may require the applicant to amend its application in order to comply with the provisions of this Act.

(3) Any collective agreement registered by the Industrial Court prior to the commencement of this Act and still in effect at the commencement of this Act is deemed to have been registered in terms of this Act and shall be have the status of a registered collective agreement under this Act.

(4) Where any of the following matters commenced before the commencement of this Act, the matters shall be determined in a accordance with the provisions of the Trade Disputes Act (now repealed)

- (a) any trade dispute that arose before the commencement of this Act;**
- (b) any trade dispute referred to the Industrial Court before the commencement of this Act;**
- (c) any revision or interpretation of an award by the Industrial Court; and**
- (d) any summary dismissal that took place before the commencement of this Act;**

Thus any registration made under the repealed Trade Unions Act was transited to the Labour Relations Act by the said provisions.

The letter from the Registrar informing the appellants of rejection of the application for registration of the Kenya Police Union refers to Section 16(1)(d)(i) of the Trade Unions Act. The Notification of Refusal of Registration however refers to Section 3 of the Trade Disputes Act and Section 29 of the Trade Unions Act. The NOTE in the notification further states –

NOTE: Upon receipt of this notice reference should be made to Section 16 of the Trade Unions Act, subsection 2 of that Section sets out provisions which have effect upon refusal of the Registrar to register.”

Section 29 of the Trade Unions Act provides as follows –

29. Officers and members of trade union

(1) All the officers and members of every trade union (not being an association of trade unions) shall be actually engaged or employed in an industry or occupation with which the union is directly concerned, and no officer of that union shall be an officer of any other union:

Provided that —

(i) the office of secretary may be filled by a person not actually engaged or employed in an industry or occupation with which the union is directly concerned; and

(ii) the Registrar may permit any other office to be filled by a person not actually engaged or employed in an industry or occupation with which the union is directly concerned.

(2) No person who has been convicted of a crime involving fraud or dishonesty shall be an officer of a trade union.

In the form accompanying the application for registration of the Kenya Police Union, the appellants describe themselves as follows –

1. Albert Mulindi Mayavi, an Administrator/Businessman – Chairman
2. Rose Watiri, a Business Lady – Vice Chairlady
3. Nicky Njuguna, an Ex-policeman/Businessman – Secretary General
4. Stephen M. Kyalo, an Ex-policeman/Businessman – Assistant Secretary General
5. Kenneth Lichoti, a Manager/Businessman – Treasurer
6. Stephen M. Karani, an Ex-policeman/Businessman – Assistant Treasurer
7. Paul Gichuru Marua, an Ex-policeman/Businessman - Trustee

The appellants thus do not have capacity to apply for registration of the Kenya Police Union as none of them is actually employed or engaged in the industry or occupation which the proposed trade union is intended to cater for as provided in Section 29.

The other section cited by the Registrar for refusal of registration is 16(1)(d)(i). The Section provides that –

16. Refusal of Registration

(1) The Registrar may refuse to register any trade union or probationary trade union if he is satisfied that -

(a) the union has not complied with the provisions of this Act or of any regulations made thereunder; or

(b) any of the objects of the constitution of the union is unlawful or

conflicts with any such provision; or

(c) the union is used for unlawful purposes; or

(d) any other trade union already registered is -

(i) in the case of a trade union of employers or of employees, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration; or

(ii) in the case of an association of trade unions, sufficiently representative of the whole or a substantial proportion of the trade unions eligible for membership thereof:

Provided that the Registrar shall, by notice in the Gazette or otherwise, notify any registered trade unions which appear to him to represent the same interests as the applicants of the receipt of such application and shall invite the registered trade unions concerned to submit in writing within a period to be specified in the notice any objections which any such trade unions may wish to make against the registration; or

(e) the principal purposes of the trade union seeking registration are not in accord with those set out in the definition of "trade union" contained in section 2; or

(f) the trade union (not being an association of trade unions) seeking registration is an organization consisting of persons engaged in, or working at, more than one trade or calling, and that its constitution does not contain suitable provision for the protection and promotion of their respective sectional industrial interests; or

(g) the funds of the union are being applied in an unlawful manner or upon any unlawful object or any object not authorized by this Act or any regulations made thereunder; or

(h) the accounts of the union are not being properly kept; or

(i) the secretary or treasurer of the union is, in his opinion, incapable, by reason of not being sufficiently literate in the English or Swahili language, of carrying out adequately the duties of secretary or treasurer, as the case may be.

(2) When the Registrar refuses to register a trade union, he shall notify the applicants in writing of the grounds of that refusal, and the following provisions shall have effect -

(a) if the trade union, before it became a trade union or applied for registration as a trade union, was a staff association, employees' association or employees' organization, it may, within one month of the notification by the Registrar or, if an appeal is taken under section 18, within one month from the dismissal of the appeal, elect to revert to its former status as such association or organization, and, in default of such election within the time aforesaid, it shall be dissolved; or

(b) if the trade union, before it became a trade union or applied for registration as a trade union, was not such an association or organization as aforesaid, the trade union shall be dissolved within one month of the notification by the Registrar or, if an appeal is taken as aforesaid and dismissed, within one month of dismissal of the appeal.

(3) If any trade union whose dissolution is required by subsection (2) is not dissolved within the time allowed, then the trade union and every officer and any person acting or purporting to act as an official thereof shall be guilty of an offence and liable to a fine not exceeding five thousand shillings, and every officer and any person acting or purporting to act as an officer thereof shall, in addition, be liable to imprisonment for a term not exceeding six months.

I agree with the petitioner's submissions that Section 16(1)(d)(i) is not a valid ground for refusal to register the police union and that this ground is inconsistent with the ground given in the Notification of Refusal of Registration issued to the appellants by the Registrar of Trade Unions. The Section provides for refusal of registration where there is already another union in existence that caters for the workers proposed to be catered for by the proposed union.

The appellants have also taken issue with the reference to section 3 of the Trade Disputes Act, arguing that the application for registration was made under the Trade Unions Act.

The preamble to the Trade Disputes Act (repealed) provides as follows –

An Act of Parliament to provide for the settlement of trade disputes generally and for the settlement of trade disputes in essential services; to provide for the establishment of Boards of Inquiry and a standing Industrial Court; to control and regulate strikes and lock-outs; to make provision regarding the collection of union dues; and for matters incidental thereto

Section 3 thereof provides as follows –

Persons to whom Act does not apply.

3. This Act shall not apply to any person in respect of his employment or service -

(a) in the armed forces, or in any reserve force thereof;

(b) in a police force, administrative police force or prison service, or in the National Youth Service, or in any reserve force or service thereof.

Part II of the Trade Disputes Act provide for reporting, conciliation and investigation of disputes. Part III provide for registration of collective agreements and Part IV for the reference of disputes for settlement and inquiry. It is under Part IV that the Industrial Court where the appeal was filed, was established.

Part V of the Act provided for adherence to agreements and awards, while part VI provided for protection of essential services, life and property in the event of a strike.

Part VII provided for collection of Trade union dues and related matters.

Essentially, it is under the Trade Disputes Act that the machinery for operation

of a trade union was provided for such that a union would be a paper union if it was excluded from the application of the Trade Disputes Act.

The Industrial Court to which this dispute was filed would have no jurisdiction to hear the appellants as the union would not fall within the jurisdiction of the court. The union would further not be able to collect union dues, to organise its members or to negotiate a collective bargaining agreement if it was excluded from the provisions of the Act. It is my understanding that this is why the Registrar of Trade Unions referred to Section 3 of the Trade Disputes Act in refusing the Registration of the Police Union.

Further, section 40 of the Police Act applicable then was explicit, that no police officer was permitted to become a member of a trade union. Article 5 of the ILO Convention No. C098 on Right to Organise and Collective Bargaining at Article 5 provides that the extent to which the convention provided for the armed forces were to be determined by national legislation, in this case the Police Act, the Trade Disputes Act, the Trade Unions Act and the Constitution, all of which did not provide for unionisation of the police force.

Section 80 of the Constitution applicable then (now repealed) provided that it was not inconsistent or a contravention of the constitution for the law to impose restrictions upon public officers, members of a disciplined force or person in the service of local government to hinder or limit the freedom of assembly and association. Thus the provisions of Section 3 of the Trade Disputes Act and Section 40 of the Police Act (both repealed) were not inconsistent with the Constitution (repealed).

Finally I wish to refer to what the Court of Appeal stated in Civil Appeal No. 251 of 2014 between the parties herein. At page 15, the Court observed as follows –

“As alluded to earlier, the appeal was never determined, all parties agreed it was perhaps overtaken by events but instead of either withdrawing it or marking it settled the ELRC being a court of record, another notice of motion was filed within the same appeal and against the same party that is the Registrar of Trade Unions despite the fact that orders sought had far reaching implications on other parties who were not named or notified of the same. The respondents’ motion sought declarations that had far reaching effect”

My understanding of this paragraph in the Court of Appeal decision that referred this case back to this court for fresh hearing is that the court stated the application herein is a matter that has been overtaken by events and should perhaps have been withdrawn instead of filing the application whose determination was the subject of the appeal. In my opinion that position is still valid and I would restate the same; that the subject of this appeal has been overtaken by the repeal of all the legislation that it was anchored on.

The Appellants have prayed that section 3 of the Labour Relations Act and section 47 of the National Police Service Act be declared unconstitutional. These are not prayers in the appeal that was filed in this court. Such prayers can in any event not be made through an appeal. The appellant would have to file a constitutional petition and bring all relevant persons on board before the court can consider the same. This is what the Court of Appeal stated in Civil Appeal No. 251 of 2014. The Court of Appeal expressed itself as follows –

“We agree with counsel for the appellant, that the procedure adopted by the respondents to bandwagon a new suit within an existing appeal was not only unprocedural but a substantive matter because the above orders were by themselves very substantive. The orders that were issued principally affected parties who ought to have been enjoined. It is evident even the learned Judge appreciated the ramification and weight of the orders he made, because he directed the ruling and order be served on all parties, the Attorney General and the Inspector General of Police. We would add that it was necessary also to involve the National Assembly perhaps the House of Parliament that was involved in legislations of the two Statutes that were declared unconstitutional as well as the Ministry in charge of Labour matters.

Counsel for the appellant submitted and rightly so, that matters touching on constitutionality of laws should be commenced by way of Constitutional Petitions under the High Court Practice and Procedure Rules and Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013 (Mutunga Rules). We agree because as much as counsel dismissed this as a mere procedural technicality, we reiterate the orders sought had far reaching implications and taking a short cut did not help the respondents. We are not convinced by submissions by counsel for the respondent that failure to join key parties where orders are directed against them to implement is curable under the broad overarching principles in the administration of justice. What concerns even most is the fact that key parties or primary parties who are mandated by the Constitution to defend the Rule of law and public interest such as the Attorney General was not a party to the motion nor was the office served. The constitutional mandate placed upon the Attorney General cannot be assumed by the Registrar of Trade Union. The Registrar of Trade Union has no role in

the various provisions of the law that were declared unconstitutional. We also find it was too late for the Judge to determine the matter and merely direct the Attorney General and the Inspector General of the police be served after the event.

*This is not just a matter of misjoinder or non-joinder of parties. The proceedings by which **Sections 3(b) of the Labour Relations Act, 2007 and 47(3) of the National Police Service Act, No 11 A of 2011** were declared unconstitutional were matters of great public interest. The orders affected the National Government, the Police Service, the Ministry in charge of Labour matters and the National Assembly. It was imperative the said parties be joined in the proceedings where the court was called upon to give an interpretation of **Article 24(5) of the Constitution** in relation to the impugned sections of the law.”*

What is before the court is the Memorandum of Appeal filed on 5th March 2007 in the Industrial Court, the predecessor of this court. The Labour Relations Act, under Section 84 and the Transitional Provisions in the Fifth Schedule provides at paragraph 4 provide that –

(4) Where any of the following matters commenced before the commencement of this Act, the matters shall be determined in a accordance with the provisions of the Trade Disputes Act (now repealed)

- (a) any trade dispute that arose before the commencement of this Act;**
- (b) any trade dispute referred to the Industrial Court before the commencement of this Act;**
- (c) any revision or interpretation of an award by the Industrial Court; and**
- (d) any summary dismissal that took place before the commencement of this Act;**

The appellants did not amend the Memorandum of Appeal following the changes in the law. It is trite law that parties are bound by their pleadings. This court can therefore only determine this appeal on the basis of the pleadings on record.

It is further trite law that unless legislation expressly provide so, any legislation takes effect on either the date it is published or after such date, to be published in the gazette. The Constitution of Kenya, 2010, the Labour Relations Act and the National Police Service Act, 2011 all do not provide for retrospective application. This therefore means that the court cannot apply the same on matters that occurred before their enactment or effective date. By granting the orders sought, the court would be applying the Acts retrospectively.

Section 80(2) of the Constitution (repealed) provided that any limitations on the freedom of assembly and association under the authority of any law was not inconsistent with the freedom of association and assembly. The Police Act at Section 40 prohibited police officers from being members of trade unions and made it an offence as well as a ground for dismissal for any police officer to become a member of a trade union.

I find that the decision of the Registrar of Trade Unions, the respondent herein, was consistent with the law as it then was. There was no violation of the constitution in force then, or any other law by the Registrar.

For these reasons I find no merit in the appeal which is consequently dismissed.

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE